Supreme Court, U.S.
FILED
MAR 25
CLERK

(3)

No. 99-1386

In The SUPREME COURT OF THE UNITED STATES

GLEN QUALLS, et al.,

Petitioners

v.

CITY OF DETROIT, et al.

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

Phyllis James
Corporation Counsel
City of Detroit Law Department
1650 First National, Building B
660 Woodmont Avenue
Detroit, Michigan 48226
(313) 224-4550 Ext. 73069

David L. Rose
Joshua N. Rose
Rose & Rose, P.C.
1835 K. St., N.W. ,Suite 900
Washington, DC 20006
(202) 331-8555
Counsel of Record

3 pp

Questions Presented

Respondents believe that the unpublished decisions below present no question warranting review by this Court, and that the petitioners waived their rights to present the second question they seek to present by failing to make that argument to the Michigan Court of Appeals below. However, respondents believe the issues petitioners seek to present are more accurately stated below as:

1. Whether the holder of a license that expired by its terms and by the City Fireworks Ordinance on February 28, 1985, had a property or other constitutional or federally protected right to that license, after he failed to file a timely a application for renewal and failed to ask for an application for a new license until March 16, 1985 ?

2. Whether an injunction, later vacated on appeal, confers a property or other constitutional or federally protected vested right on the party obtaining the injunction ?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF PARTIES v

STATEMENT OF JURISDICTION 1

PUBLISHED OPINIONS..... 1

STATEMENT OF THE CASE

A. THE UNDERLYING FACTS..... 2

B. LITIGATION BETWEEN QUALLS AND THE CITY OF DETROIT SINCE 1979..... 5

REASONS FOR DENYING THE WRIT..... 16

A. Qualls Lost Any Property Interest He May Have Had in His One Year FireworksLicense When He Violated the City Code, Then Failed to Apply for Renewal Before the Expiration Date..... 17

B. Petitioner Failed to Preserve his Argument that Alleged Violations of Injunctive Orders Later Reversed On Appeal Rise to the Level of Violations of the Laws or Constitution of the United States Actionable Under 42 U.S.C. 1983; Further, the Argument is Contrary to Settled Law and is Largely Moot..... 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES CITED:

Albright v. Oliver, 510 U.S. 266 (1994) 15

Detroit v. Qualls, 434 Mich. 340, 454 N.W. 2d (1990), *stay vacated* 437 Mich. 1017, 472 N.W. 2d 636 (1991) 2,5

Monell v. New York City Dept. Of Social Services, 436 U.S. 658 (1978) 15

Smith v. Dept. Of Public Health, 428 Mich. 540, 642 (1987) 16

Stajos v. City of Lansing, 221 Mich. App. 223, 561 NW2d 116 (1997), *appeal denied*, 584 NW2d 588 (Mich Aug. 28, 1998), *reconsideration denied*, 587 N.W.2d 500 (Mich. Oct. 26, 1998), *cert. denied*, __ U.S. __ 119 S.Ct. 1455 (1999)..... 11

United States v. United Mine Workers, 330 U.S. 252, 295 (1947) 17, 21

OTHER AUTHORITIES:

Validity, Contruction and Application of State or Local Laws Regulating the Sale, Possession Use or Transport of Fireworks, 48 ALR 5th 659 (1997)..... 5

The Parties to the Proceedings

Petitioners accurately list the parties. Each respondent other than the City of Detroit was an officer or employee of the City of Detroit involved in the enforcement of the Detroit Fireworks Ordinance and the Michigan Fireworks Act. Donald Pailen was the Corporation Counsel, and Frank Jackson and Alberta Whitfield were Assistant Corporation Counsel. William Hart was the Chief of Police and James Bannon was the Deputy Chief of Police. Donald Robinson was the Fire Marshall of Detroit, Robert Michalik was his second in command. Esther Shapiro was the Director of the Detroit Department of Consumer Affairs. The remaining named individuals were police officers, firefighters or other City employees.

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. 1257(a). Petitioners seek review of the decision of the Michigan Court of Appeals dated May 26, 1998 (Q.App. D), rehearing denied, Sept. 4, 1998 (Q.App. C). Petitioners Delayed Application for Leave to Appeal was denied by the Michigan Supreme Court on Aug. 31, 1999 (Q.App. B). On or about Nov. 24, 1999, petitioners filed a motion for an extension of 60 days within which to filed a petition for a writ of certiorari, and that motion was docketed as No. 99-A457, and was granted by Order of Justice Stevens. The petition was timely filed pursuant to that Order on January 27, 2000, and was docketed on February 22, 2000.

PUBLISHED OPINIONS

There are no published opinions in these civil cases. The order of the Michigan Supreme Court dated Aug. 31, 1999, denying the Delayed Application

for Leave to Appeal from the unpublished Opinion of the Michigan Court of Appeals (Q. App. D) is reported at ____ Mich ____, 601 N.W.2d 391 (Mich August 31, 1999). The order of the Michigan Supreme Court denying leave to appeal from the unpublished Opinion and Order of the Court of Appeals dated March 6, 1991 (Q. App. K) is reported at 437 Mich. 1017, 472 N.W. 2d. 636 (1991).

The decision of the Michigan Supreme Court on a related criminal case between the parties is found at Detroit v. Qualls, 434 Mich. 340, 454 N.W. 2d 248 (1990), stay vacated 437 Mich. 1017, 472 N.W. 2d 636 (1991).

STATEMENT OF THE CASE

A. The Underlying Facts.

Glenn Qualls operated a seasonal retail fireworks store at 817 Seven Mile Road, Detroit, near the intersection of I-75 and Seven Mile Road, known as "Ho Lee Kow" beginning in 1978. From 1979 to 1984, Qualls obtained annual City licenses to operate his store. During a December 1984 hearing in a

related criminal proceeding by the City, Qualls testified that he kept over 100 pounds of fireworks at his store although storage was limited to 100 pounds on the face of his license, by the City Ordinance, and by orders and settlement agreements in earlier litigation between Qualls and the City. E.g. Q.App. m1. During the same month, a large fireworks storage facility owned by Qualls and located in Romulus, Michigan, exploded, demolishing the building and sending chunks of concrete hundreds of feet away. The morning after the explosion a City official placed a "do not renew" note in Qualls' license file, indicating that the license should not be automatically renewed. The time for renewing the license and the license itself expired on February 28, 1985, and Qualls did not file an application to renew it until at the earliest March 16, 1985, when he submitted a licensing fee for the next season. Q. App. D, d4. On April 16, 1985, Qualls sent a letter to Esther Shapiro, Director of the Office of Consumer Affairs asking that his license be renewed. By letter of April 22, 1985, Ms. Shapiro denied his request,

because, among other things, Qualls stored more than 100 pounds of fireworks in his store, contrary to the express terms of the Detroit Fireworks Ordinance and the license he held. Q. App. D, d 4. Qualls did not seek administrative review of that decision. Q. App. G, g 4.

Qualls opened the store in the Spring of 1985 without a license, and filed the present action challenging the City's Fireworks Ordinance. He obtained a preliminary injunction by order of the trial court (Judge Hausner) on July 3, 1985, and further injunctive relief on June 24, 1986. Q. App. N, n 1-3, and 4-9. The injunctive orders were stayed and reversed on appeal in June, 1989 and March, 1991. Q. App.K, k 18, and k 20, and were formally vacated in 1992 and 1993. Q. App. F, f 4. He did not operate retail fireworks store in Detroit thereafter.

B. Litigation between Qualls and the City of Detroit Since 1979.

Michigan, like a majority of other states, has long exercised the authority to restrict the sales of fireworks items that are not restricted by federal law. *See generally, Validity, Contruction and Application of State or Local Laws Regulating the Sale, Possession Use or Transport of Fireworks*, 48 ALR 5th 659 (1997).

1. In 1979, the City arrested an employee of Qualls, and seized some of his fireworks, and it seized additional fireworks in 1980. Qualls sued to obtain the return of the fireworks, and the suit was settled. See facts stated in *Qualls v. City of Detroit*, 434 Mich. 340, 454 N.W. 2d 248 (1990), *stay vacated* 437 Mich. 1017, 472 N.W. 2d 636 (1991) (hereafter "Qualls I").

In the summer of 1984, the City issued a ticket to Qualls, charging him with violating the 100 pound weight limit set forth in the Detroit Fireworks Ordinance. *Detroit v. Qualls*, 36th Dist. Court No. V87-516. That suit resulted in the decision

of the Michigan Supreme Court in *Qualls I*, above.

2. The first of the three cases filed in the Wayne County Circuit Court (hereafter either the "trial court' or "WCCC") on which petitioners seek review, WCCC CA 85-515-546, was filed in June, 1985. The trial court issued a preliminary injunction on July 3, 1985, and further injunctive relief on June 24, 1986. Q. App. N, n 1-3 and n 4-9. The trial court also held that the City was in contempt of its orders, and found that Qualls had lost $169,333 in gross sales for 1985 and 1986 as a result of the City's conduct, and that the City caused $3,577 worth of damages to Qualls' property; and therefore assessed contempt damages for a total of $172,910 in damages, and ordered the City to pay that amount, plus interest and attorneys' fees. The same order contained further injunctive rulings. Q. App. R r 1-11. The City appealed as of right.

On appeal the Court of Appeals, relying in substantial part upon the ruling of the Michigan Supreme Court in *Qualls I*, held that the Michigan Fireworks Act did not preempt more

restrictive regulation of fireworks by home rule cities. That Court also held that the City licensing ordinance was constitutionally valid, and that the licensing procedures of the City were valid, if they were not so vague and without discernible standards as to give undue discretion to city officials, and remanded for further proceedings. The unpublished Opinion of March 6, 1991, is found at Q. App. K. That Opinion is referred to in subsequent decisions of the trial court as "*Qualls* II."

In *Qualls II*, the Court of Appeals also reversed the injunctions and vacated them for further consideration in light of *Qualls I* and its decision. Q. App. K . The Court of Appeals, however, sustained the contempt holding, but ruled that the trial court had erred in assessing damages, among other things because the lost profits must be based upon net profit, not gross profit, as ruled by the trial court. Q. App. K, k 23-24. It also sustained some other rulings of the trial court, and remanded for further proceedings. Id. k 28-35.

On remand, the trial court (per Judge Hausner) entered an order vacating most[1] of his own orders. Order of March 5, 1992. Qualls in 1992 filed an additional action, alleging the same kinds of conduct as in the 1985 suits. CCWC C.A. No. 92-206766 NI. Shortly thereafter, Judge Hausner recused himself, and the case was assigned to Judge Simmons. After a trial on the merits of Phase I of the suit (issues concerning prospective relief) Judge Simmons entered an Opinion of April 28, 1993, Q. App. E, and Order of May 17, 1993, Q. App. F.

As Glen Qualls admitted in his testimony and in the Brief in the Court of Appeals, the preponderance of items sold at the Ho Lee Kow store were fireworks lawful for sale to consumers under federal law (DOT Class "C" or common fireworks), but restricted under the Michigan Fireworks Act to

---

1. The only relevant order not vacated by Judge Hausner was issued in December 1988. See. QA 390a in the Court of Appeals. The City had not listed it among the orders to be vacated because it was primarily concerned with damages for contempt, an issue that became moot when the underlying orders were vacated. That order was vacated by Judge Simmons. QA f-4.

holders of display permits (MCL 750.243a(2)) and those selling for shipment to a state where consumers could lawfully possess such items (Court of Appeals Order of June 27, 1989 construing MCL 750.243a(3)(g) and Court of Appeals decision in "*Qualls* II"). *See also*, list of Qualls' admissions at Appeal Brief, DA tab 1, p. 1. They were unlawful for sale by Qualls under the Michigan Fireworks Act as well as under the City's Fireworks Ordinance. *Id.*

Although Judge Hausner ruled in 1985 and 1986 that some of those items were lawful for sale in Detroit by Qualls, that ruling was based on the erroneous view that Qualls could sell any item allowed by Federal law to consumers who signed a statement that they would take them (by bicycle, foot or car) out of state, and the ruling that the Detroit Ordinance was void and unenforceable. Orders of June 24, 1986, QA 172a; December 1988, QA 283a, 390a. The "loophole" for shipment out of state was closed by a Court of Appeals Order of June 27, 1989 and in *Qualls II.* Q. App. K, k 17-20. The injunctive

rulings were explicitly vacated on remand. Orders of March 5, 1992; May 17, 1993. Q. App. F.

By Opinion of April 28, 1993, the trial court (Simmons) ruled, *inter alia,* that the phrase "fireworks containing an explosive or flammable compound" as used in MCL 750.243a(2)(d) means all fireworks. Thus, it is unlawful to "offer for sale . . . possess, give, furnish, transport [or] use . . ." all fireworks without a permit, except for those categories explicitly listed in MCL 750.243(a)-(f). The Court of Appeals affirmed that ruling in May 1998, based upon the law of the case doctrine. Q. App. D, d 2. Later, the Michigan Court of Appeals found precisely the same meaning in precisely the same statutory language, *Stajos v City of Lansing*, 221 Mich App 223, 561 NW2d 116 (1997), *appeal denied*, 584 NW2d 588 (Mich Aug. 28, 1998), *reconsideration denied*, 587 N.W.2d 500 (Mich. Oct. 26, 1998), *cert. denied*, U.S. , 119 S.Ct. 1455 (1999).

The testimony of Glen Qualls was that he sold the

restricted items without a permit to customers with no permit, and kept more than 100 pounds of fireworks on the premises of Ho Lee Kow in Detroit, because he could not make a profit selling only fireworks that were unrestricted under the Michigan Fireworks Act as construed above. He testified that the only lawful fireworks items under the Act as so construed were small and inexpensive, and because he sold fireworks only during the Fourth of July holiday season, he could not make a profit on such sales alone. In light of his testimony that he could not lawfully operate under the Michigan Fireworks Act as so construed, his claim for damages for contempt of court became moot after *Qualls* II, because he suffered no harm from the operation of a lawful business, and could only make a profit through the storage and sale of fireworks that were unlawful for sale in Michigan except to permit holders.

In his Opinion of April 28, 1993, Judge Simmons ruled that the Ordinance was largely valid and constitutional, except for the provisions barring the sale of cone fountains and smoke

devices. Q. App. E.

Thereafter the trial court granted defendants' motion for summary disposition in part, and ruled among other things that there was no liability of the City for the denial of Qualls' late application for renewal of his license in 1985, both because his application was late, and because in fact he admitted in testimony that he had repeatedly stored more than one hundred pounds of fireworks in the store. Q App. G, g 4-9. The Court also rejected the claims of Qualls that the violation of Judge Hausner's orders violated a constitutional or other vested right of Qualls. Q App. G, g 14-15.

A fourth case was filed by Qualls, et al in 1994, alleging the same kinds of conduct by the City. CCWC C.A. 94-420312 CZ. The trial court (per Judge Stacey) granted summary judgment for the City on most of the claims. Q App Q.

Thereafter, in 1995, the remaining claims in the three cases were settled and/or dismissed, without prejudice to the right of the plaintiff Qualls et al to take an appeal from any

errors alleged in the prior decisions. Q App. H and J. Qualls appealed as of right to the Michigan Court of Appeals, and the City cross-appealed on one issue concerning the validity of the provisions of the Fireworks Ordinance that the trial court had found to be invalid. In 1993, the City adopted an amended Fire Ordinance that was consistent with the rulings of the trial court, and that clarified a number of provisions that had been ambiguous or antiquated. City of Detroit Ordinance 10-93, June 30, 1993.

The proceedings on appeal were delayed for many months. Defendants-Appellees and Cross-Appellant, City of Detroit, et al, filed a motion to dismiss the appeals for failure to comply with the timeliness rules and for failure to prosecute the appeal. The Court of Appeals initially granted the motion, but later granted the plaintiff Qualls and others leave to file a Brief served on November 13, 1996.

The nine issues listed by Qualls in the Brief for Appellants were 1) that the City and its employees had denied

Qualls a license in violation of his rights of due process; 2) that the Fireworks Ordinance is invalid on its face and as applied; 3) that the Michigan Fireworks Act is preempted by federal statutes and regulations; 4) that the Act is void for vagueness; 5) the federally defined categories of consumer categories are not "of like construction" to the restricted items in the Act; 6) that the trial court erred in ruling that the phrase 'all fireworks containing an explosive or inflammable compound' includes all fireworks; 7) the history of the Michigan Act is one of inclusion, not total prohibition; 8) the trial court erred in finding as a matter of law the acts of the defendants "merely contemptuous, not a violation of civil rights"; and 9) that the Court of Appeals should reconsider its ruling in *Qualls II* on the sales for shipment out of state issue.

In rejecting the "civil rights" claims of Qualls under 42 U.S.C. 1983, the trial court had relied upon the decisions of this Court in *Albright v. Oliver,* 510 U.S. 266 (1994), *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) and

Smith v. Dept. of Public Health, 428 Mich 540, 642 (1987). Q. App. Q q 9-12. In its argument on pages 95-99, the Brief for Qualls did not cite or discuss any of those cases. Nor did the Court of Appeals on appeal. Q. App. D, d 6.

We have reviewed pages 95-99 of the Brief for Qualls in the Court of Appeals (the only section addressing the alleged civil rights issues), and have found no discussion of the second "Question Presented" in the Petition (p. a) and no argument that the trial court erred in its reliance (Q. App. G, g 24) upon *United States v. United Mine Workers*, 330 U.S. 252, 295 (1947).

By unpublished Opinion of May 26, 1998, the Michigan Court of Appeals affirmed the rulings of the trial court on all counts. The Court expressly rejected the claims based upon the failure to renew Qualls' fireworks license in 1985. Q. App. D. There was no discussion by the Court of Appeals of any theory that the 1985 and 1986 orders of Judge Hausner somehow conferred property rights upon Qualls, nor

did the Court of Appeals in that unpublished Opinion cite or rely upon the *United Mineworkers* decision, *supra*. In short, Qualls failed to assert any argument in the Court of Appeals that the trial court had erred in applying the *United Mineworkers* ruling to the facts of this case, or that the decision in that case was outdated, distinguishable or otherwise not the law of the United States.

REASONS FOR DENYING THE WRIT

The unpublished decisions of the Court of Appeals of Michigan set forth no novel or important ruling of law. Indeed, by deciding not to publish its two opinions in this case, the Court of Appeals determined that they had no precedential value. M.C.R. 7.215(B) & (C).

Those two intermediate state court opinions are not in conflict with any decision of a United States Court of Appeals, nor are they in conflict with the decision of any state court of last resort of any other state. The Petition indeed asserts no such conflict. Accordingly, the Petition fails to assert any

consideration in favor of the grant under Rule 10(a) or 10(b) of the Rules of this Court warranting the grant of the Petition. And the Petition asserts no conflict between the appellate decisions below on an important issue of federal law with the relevant decision of this Court under Rule 10(c). Nor does the Petition identify any issue of federal law that should be, but has not been settled by a decision of this Court. See, Rule 10(c). Accordingly, the Petition should be denied.

A. Qualls Lost Any Property Interest He May Have Had in His One Year Fireworks License When He Violated the City Code, Then Failed to Apply for Renewal Before the Expiration Date

The primary argument made by Qualls in the Petition is that the courts below erred in failing to recognize that the City's denial of a license to Glen Qualls in 1985 deprived him of a constitutional right, because of the automatic renewal provision of the Detroit Licensing Ordinance and the failure to give notice of its intent to deny. Petition at 1-6. However, the Licensing Ordinance provides that "Unless the interested City

departments notify the consumer affairs department of an existing violation at least fifteen days before the expiration of the licenses, the licenses will be renewed." Sec. 30-1-14, entitled "Renewal." The Ordinance specifies that violation of a City Ordinance is a ground for denial, suspension or revocation of a license. Sec. 30-1-16(b)(1)(a). Q. App. P, p 5. In this case, the uncontradicted evidence showed that the Consumer Affairs Department had received notice of an existing violation in December, 1984, by virtue of Mr. Qualls' testimony that he stored between 300 and 400 pounds of fireworks at the Ho Lee Kow store in Detroit. Although the license stated on its face that it expired in February 1985, Qualls apparently made no inquiry about his license or the receipt of a renewal application or notice before March 15, 1985, when he appeared at the department of Consumer Affairs to ask for a license form, after the license had expired by its own terms. Qualls made no written application for renewal until his letter of April 16, 1985. Q. App. G g 4-9. Under the settled law of

Michigan, as with most other states, a license holder who has not filed an application until after his license has expired is not seeking renewal, but the grant of a new license. Id., and cases cited. The decisions on this point are in accord with the settled authority of the courts of Michigan and the courts of other states and with the decisions of federal courts. Id. There is no reason for this Court to review those decisions.

B. Petitioner Failed to Preserve his Argument that Alleged Violations of Injunctive Orders Later Reversed On Appeal Rise to the Level of Violations of the Laws or Constitution of the United States Actionable Under 42 U.S.C. 1983; Further, the Argument is Contrary to Settled Law and is Largely Moot

The Petition relies upon the dissent *in United States v. United Mine Workers, supra*, and argues that the trial court misapplied that case to the facts before it. However, the Petition neglects to mention that Qualls and the other plaintiffs waived any right they had to make that argument in this Court, because they failed to make it in the Court of Appeals below. See Rule 15.2. Indeed, the trial court cited that case after the

sentence stating that "This injunction gave the plaintiffs no property rights, not only for the reasons stated earlier, but for the reason that it was ultimately vacated as having been erroneously issued." Q. App. G, g 24. Even the trial court did not rely upon that decision as the primary basis for its holding that Qualls had no property interests.

In any event the argument is without merit. As the trial court ruled, no suit lies against the City for deprivation of a federal right under 42 U.S.C.1983, unless the plaintiffs have alleged and can show "that acts of its officers [violating their rights] were carried out pursuant to a policy, plan or custom of the City." The trial court ruled that Qualls had failed to allege or introduce evidence showing that there was any such policy or practice or custom of the City. Q. App. Q, q 12.

Finally, that question of law is largely academic in light of the rulings upholding the weight limit and licensing scheme of City Ordinance and the City's interpretation of the Michigan Fireworks Act as barring the possession or sale of most of the

items Qualls sold. Qualls admitted that he kept 300-400 pounds of fireworks and that he the bulk of his sales of fireworks were of fireworks that were restricted under State law as interpreted by the trial court and the Court of Appeals. He has consistently argued that the laws are invalid precisely because they prevent him from lawfully conducting a profitable business as a seasonal fireworks dealer in Detroit. Accordingly, any financial interest he may have had in conducting the kind of business he conducted under the trial court's orders of 1985 and 1986 (and therefore any loss he suffered by the City enforcement efforts which he believes to have been unconstitutional) was based upon unlawful conduct by him and his employees. There is no federal constitutional or statutory right to engage in a business which is prohibited by valid state and local regulation.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Phyllis James
Corporation Counsel
City of Detroit Law Department
1650 First National, Building B
660 Woodmont Avenue
Detroit, Michigan 48226
(313) 224-4550

David L. Rose
Joshua N. Rose
1835 K Street, N.W
Suite 900
Washington, DC 20006
(202) 331-8555
Counsel of Record

Attorneys for the Respondents, City of Detroit et al.

March 23, 2000